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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTAKE WATER COMPANY,

Appellant,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Montana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether this Court has mandatory and exclusive jurisdiction over an appeal from a judgment on the merits of a federal constitutional claim entered by a three-judge District Court where the losing party in that court appeals only the denial of a declaratory judgment and not the denial of injunctive relief.

2. Whether an interstate compact, by virtue of its being approved by Congress, is thereby automatically immunized from attack under the Commerce Clause of the Constitution, even though Congress in approving the compact never considered, discussed, referred to, or passed upon any potential impact upon interstate commerce.

3. Whether Article X of the Yellowstone River Compact, which bans out-of-basin diversions of water from the Yellowstone River, constitutes an impermissible burden on interstate commerce under the Commerce Clause under such cases as *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Gary Fritz, George L. Christopulos, and L. Grady Moore, as members of the Yellowstone River Compact Commission; Mike Greely, Attorney General of the State of Montana; Vernon Fahy, the State Engineer of the State of North Dakota; and the North Dakota State Water Commission were parties to this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	7
CONCLUSION	21
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Bush v. *Muncy*, 659 F.2d 402 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982) 16
City of Altus v. *Carr*, 258 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966) 20
Cuyler v. *Adams*, 449 U.S. 433 (1981) 13, 14, 15, 17
Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 21
Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419 (1940) 14
Equal Employment Opportunity Comm'n v. Allstate Ins. Co., 52 U.S.L.W. 3889 (U.S. June 12, 1984) (No. 83-1021) 9
Heckler v. *Edwards*, 104 S. Ct. 1532 (1984) 8, 9, 10
Heffez v. *Washington Metropolitan Area Transit Authority*, 569 F. Supp. 1551 (D.D.C. 1983) 15
Gonzalez v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974) 8, 10
Jacobson v. *Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977) 15
Lake Country Estates v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) 15, 17
Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1972) 7
Mitchell v. *Donovan*, 398 U.S. 427 (1970) 7, 8, 9, 10
Montana Department of Natural Resources and Conservation v. *Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110 (1976) 5, 19
MTM, Inc. v. *Baxley*, 420 U.S. 799 (1975) 7
New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 12, 13, 17, 20
Petty v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) 14
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 18
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 13, 17
Rockefeller v. *Catholic Medical Center*, 397 U.S. 820 (1970) 7
South-Central Timber Development, Inc. v. *Wunnicke*, 52 U.S.L.W. 4631 (U.S. May 22, 1984) (No. 82-1608) 12, 17, 20, 21

TABLE OF AUTHORITIES—Continued

Page

Sporhase v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) 12, 18, 19, 21
Texas v. *New Mexico*, 103 S. Ct. 2558 (1983) 13, 15, 17, 18
United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 15, 16
Washington Metropolitan Area Transit Authority v. *One Parcel of Land in Montgomery County, Maryland*, 706 F.2d 1312 (1983), *cert. denied*, 104 S. Ct. 238 (1983) 16
West Virginia ex rel. Dyer v. *Sims*, 341 U.S. 22 (1951) 14
Wilentz v. *Sovereign Camp*, 306 U.S. 573 (1939) 9

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, § 8, cl. 3 ..... *passim*
U.S. Const. art. I, § 10, cl. 3 ..... *passim*

STATUTES:

28 U.S.C. § 1252 ..... 8, 9
28 U.S.C. § 1253 ..... 2, 7, 8, 10
28 U.S.C. § 1291 ..... 7, 8
28 U.S.C. § 2281 1
Federal Power Act, 16 U.S.C. §§ 824-824K (1976 & Supp. III 1979) 13
Mont. Code Ann. § 85-2-801, *et seq.* 5
Mont. Code Ann. § 85-20-101 4
N.D. Cent. Code § 61-02-14 (1960) 4
N.D. Cent. Code § 61-23-01 (1960) 4
Pub. L. No. 83, 63 Stat. 152 (1949) 4
Wyo. Stat. § 41-12-601 (1977) 4
Wyo. Stat. § 41-12-604 (1983) 6
Wyo. Stat. § 41-12-604(e) (1983) 6
Yellowstone River Compact, Act of October 10, 1951, Pub. L. No. 231, 65 Stat. 663 ..... *passim*

CONGRESSIONAL MATERIALS:

H.R. Rep. No. 1118, 82d Cong., 1st Sess. (1954) 4
H.R. Rep. No. 1137, 73d Cong., 2d Sess. (1934) 14

TABLE OF AUTHORITIES—Continued

Page

S. Rep. No. 837, 82d Cong., 1st Sess. (1951) 4
S. Rep. No. 1007, 73d Cong., 2d Sess. (1934) 14

OTHER AUTHORITIES:

Minutes of the Yellowstone River Compact Commission Meeting held November 9, 1978 5
Second Amended Complaint For Declaratory Judgment And Application For Injunctive Relief From Three-Judge Court, *Intake Water Co.* v. *Yellowstone River Compact Comm'n*, CV No. 1184 (D. Mont. filed December 16, 1981) 6
Transcript of Proceedings, *Intake Water Co.* v. *Yellowstone River Compact Comm'n*, CV No. 1184 (D. Mont. held April 19, 1984) 19
Wyoming Framework Water Plan, prepared by Wyoming State Engineer, May 1973 19

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Montana (App. 4a-15a) is not yet officially reported.

JURISDICTION

The judgment of the three-judge District Court was entered on October 25, 1983. App. 1a.[1] Appellant filed

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[1] At the time this case was filed on June 23, 1973, a three-judge District Court was required for any suit in which a party sought to enjoin enforcement of a state statute on federal constitutional grounds. See 28 U.S.C. § 2281, repealed prospectively by Act of

a timely motion for reconsideration on November 4, 1983, which was denied on April 30, 1984, with opinion. App. 16a-17a. The jurisdiction of this Court, if proper (*but see* pp. 7-10, *infra*), would rest upon 28 U.S.C. § 1253.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause of the Constitution (Art. I, § 8, cl. 3) provides in pertinent part:

> The Congress shall have Power * * * to regulate Commerce * * * among the several States * * *.

The Compact Clause of the Constitution (Art. I, § 10, cl. 3) provides in pertinent part:

> No State shall, without the Consent of Congress, * * enter into any Agreement or Compact with another State * * *.

28 U.S.C. § 1253 [2] provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Article X of Yellowstone River Compact provides in pertinent part:

> No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. * * *

August 12, 1976, 90 Stat. 1119. The complaint in this case challenged the constitutionality of a state statute on several such grounds, thereby requiring that a three-judge court be convened to decide the issue.

[2] 28 U.S.C. § 1253 was prospectively repealed by the Act of August 12, 1976, 90 Stat. 1119. That repeal, however, did not affect cases filed prior to the effective date of the act, as this one was.

STATEMENT OF THE CASE

This case involves the question whether states, acting under the auspices of a congressionally approved interstate compact designed to resolve water allocation disputes among the signatories, are invested, by virtue of that compact, with full federal authority over interstate commerce in the subject waters. At issue is Article X of the Yellowstone River Compact ("the Compact"), which provides that no water may be diverted from the Yellowstone River Basin without the unanimous consent of the signatory States—Montana, North Dakota, and Wyoming. Since the Compact was enacted by Congress on October 10, 1951 (Pub. L. No. 231, 65 Stat. 663), no diversion of water outside the Yellowstone River Basin has occurred.

Appellant, Intake Water Company ("Intake"), is a Delaware corporation regularly doing business in the State of Montana. On June 8, 1973, Intake, acting in accordance with the then existing laws of the State of Montana, appropriated 80,650 acre-feet per year of the waters of the Yellowstone River. In accordance with Montana law and Article VII of the Compact, copies of the documents evidencing Intake's claim to waters of the Yellowstone River were filed with the State Engineer of the State of Montana and the State Engineer of the State of North Dakota.

Intake proposes to divert the appropriated waters for use in interstate commerce. In particular, Intake intends to use water from the Yellowstone River for sale, rent or distribution to agricultural, municipal, and industrial water users within and outside the Yellowstone River Basin in Montana and North Dakota.

The Compact is the product of extended negotiations among the signatory States, which were encouraged by a series of congressional enactments authorizing them to

enter an agreement to resolve potential disputes concerning allocation of the waters of the Yellowstone River. Pub. L. No. 83, 63 Stat. 152. The Compact was approved by the signatory States and codified in their laws prior to ratification by Congress. Mont. Code Ann. § 85-20-101; Wyo. Stat. § 41-12-601 (1977); N.D. Cent. Code § 61-23-01 (1960). Act of October 10, 1951, Pub. L. No. 231, 65 Stat. 663.

The legislative history of the Compact in the Congress recounts the background of the negotiations among the signatory States, focusing on the technical means ultimately adopted in the Compact for determining state allocations of Yellowstone River water. The committee reports from the House of Representatives and the Senate, and the Act granting consent, demonstrate that Congress never considered potential burdens on interstate commerce at the time it approved the Compact. S. Rep. No. 837, 82d Cong., 1st Sess. (1951); H.R. Rep. No. 1118, 82d Cong., 1st Sess. (1951); Pub. L. No. 231, 65 Stat. 663.

Commencing on November 9, 1977, Intake undertook at the administrative level to obtain the unanimous consent of the signatory States to an out-of-basin diversion of the appropriated water. Intake simultaneously petitioned the Yellowstone River Compact Commission ("the Commission") and the North Dakota State Water Commission (the "State Water Commission") for approval of a diversion of 30,000 acre-feet of water from the Yellowstone River Basin to the Little Missouri River Basin.[3]

Intake's petition was three times considered at meetings of the Commission. Ultimately, the Commission ruled that consent on behalf of the signatory States, Montana and Wyoming, was a matter for the legislatures of those States, and the Commission did not have jurisdic-

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[3] A petition was filed with the Board because North Dakota has no representative on the Commission and the Board had statutorily delegated to it authority to consent to out-of-basin diversions on behalf of North Dakota. N.D. Cent. Code § 61-02-14 (1960).

tion to act on Intake's petition. Accordingly, the Commission dismissed it.[4] Minutes of Commission meeting held November 9, 1978.

In October of 1980, Intake reactivated[5] this lawsuit in the United States District Court for the District of Montana by filing an Amended Complaint for Declaratory Judgment and Application for Injunctive Relief From Three-Judge Court following its unsuccessful efforts to win administrative consent from the Commission to an out-of-basin diversion. The appellees filed a Motion to Dismiss in response to such Amended Complaint.

In January of 1981, Intake went to the Montana legislature seeking legislative relief, but the Montana legislature refused to enact a measure consenting to a proposed diversion of 14,000 acre-feet per year by Intake from its total appropriation of 80,650 acre-feet per year for use outside the Yellowstone River Basin. In the same year, however, Montana did enact legislation delegating authority to a designated state agency to consent to out-of-basin diversions on behalf of Montana on the condition that the first such consent be ratified by the legislature.[6]

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[4] Intake then withdrew its petition to the Board in North Dakota because it would have served no useful purpose to pursue the petition in North Dakota in light of the Commission's ruling on the petition as to Montana and Wyoming.

[5] The proceedings in this case, which was filed on June 29, 1973, had been stayed pending the outcome of litigation challenging the validity of Intake's appropriation. The Supreme Court of Montana upheld the validity of Intake's appropriation in *Montana Department of Natural Resources and Conservation* v. *Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110 (1976). On October 17, 1980, the District Court entered an order dissolving the stay of proceedings in this suit on application of Intake.

[6] Intake's proposed out-of-basin diversion, if approved under this statute, would, in all likelihood, be the first such determination. Thus, legislative approval would still be a condition precedent to Intake's proposed out-of-basin diversion in Montana.

Mont. Code Ann. §§ 85-2-801, *et seq.* In 1983, the Wyoming legislature delegated authority to the Wyoming State Engineer to consent to out-of-basin diversions of Yellowstone River water on behalf of the State of Wyoming. Wyo. Stat. § 41-12-604 (1983). However, the statute expressly provides that approval of an out-of-state transfer is not approval of an interstate use. An interstate use still requires legislative approval. Wyo. Stat. 41-12-604(e) (1983).

In December of 1981, Intake filed a Second Amended Complaint for Declaratory Judgment and Application for Injunctive Relief From Three-Judge Court alleging the unsuccessful attempt to obtain legislative consent in Montana. The appellees renewed their Motion to Dismiss directed to the Amended Complaint in response to the Second Amended Complaint.

In all pleadings Intake alleged, *inter alia*, that Article X of the Compact "discriminates against, unreasonably impedes and exerts an undue burden on interstate commerce in violation of Article I, Section 8 of the Constitution * * *." *E.g.*, Plaintiff's Second Amended Complaint, p. 15. Intake sought declaratory relief in the form of a judgment declaring that Article X of the Compact violates the Commerce Clause, and injunctive relief in the form of an order permanently enjoining named state officials from enforcing Article X. *Id.* at pp. 35-36. This appeal arises from the District Court's decision granting the Motion to Dismiss as to the Second Amended Complaint.

The three-judge panel dismissed Intake's Commerce Clause claim on the ground that Article X of the Compact had been transformed by congressional consent into a federal law and therefore was immune from attack under the Commerce Clause. App. 4a-15a.[7] As made clear in its notice of appeal filed in the District Court

[7] The District Court also dismissed other claims raised by Intake which are not the subject of this appeal. App. 4a-15a.

(see App. 18a-19a), Intake is appealing only from the denial of declaratory relief, seeking a declaration that the Article X ban on out-of-basin water diversion is an impermissible state burden on interstate commerce, in violation of the Commerce Clause.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. *The Jurisdictional Issue.* Although appellant originally sought both declaratory and injunctive relief in its complaint, it has appealed only from the three-judge District Court's denial of declaratory relief. See App. 18a-19a. The threshold question before the Court is therefore whether this appeal must be brought directly to this Court under 28 U.S.C. § 1253 or whether it should be brought to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291. We submit that jurisdiction lies in the Court of Appeals.[8]

It is true that there is uncertainty on this issue. On the one hand, the Court has ruled that an appeal may properly be brought to this Court from the denial of all relief to a party who has properly invoked the jurisdiction of a three-judge court, where the denial rests upon that court's resolution of the merits of a plaintiff's federal constitutional claims. *See MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975) (*per curiam*). *See also Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541 n.5 (1972) (appeal proper where relief denied because complaint dismissed for lack of jurisdiction). On the other hand, the Court has made clear that it lacks jurisdiction under 28 U.S.C. § 1253 to review the decision of a three-judge court to deny declaratory relief alone. *See Mitchell* v. *Donovan*, 398 U.S. 427 (1970) (*per curiam*); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970) (*per curiam*). And, more recently, the Court has ruled

[8] Appellant has filed this Jurisdictional Statement to preserve its rights should either this Court or the Court of Appeals rule instead that jurisdiction properly lies in this Court.

that the federal government cannot appeal to this Court, under 28 U.S.C. § 1252, a District Court's ruling that a federal statute is unconstitutional where the government seeks to have only a portion of the judgment, relating to the proper remedy, set aside. *Heckler* v. *Edwards*, 104 S. Ct. 1532 (1984). The question here is therefore whether a party's appeal solely from the denial of declaratory relief, where both declaratory and injunctive relief were originally requested, is not akin to the appeal from the denial of declaratory relief, where that relief alone was requested, so that the appeal should be brought to the Court of Appeals under 28 U.S.C. § 1291 rather than to this Court under 28 U.S.C. § 1253.

Although the literal language of Section 1253 might appear to require appellant to bring its appeal here, this Court has "frequently deviated from the path of literalism" in construing "the opaque terms and prolix syntax of * * * statutes" like this one. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 96, 96-97 (1974). The Court has recognized that "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." 419 U.S. at 97 (footnote omitted). The Court has therefore striven to give Section 1253 a construction that is faithful to its purpose yet also consistent with "the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Id.* at 98 (footnote omitted). For such reasons, the Court concluded in *Mitchell* v. *Donovan*, 398 U.S. at 430-432, that an appeal from the denial of declaratory relief alone should be brought to the Court of Appeals.

Similarly, in *Heckler* v. *Edwards*, the Court conceded that under a "literal reading" of Section 1252, "a party not contesting the constitutional holding would seem to be required to proceed directly to this Court for review

of other aspects of the [lower] court's judgment." 104 S. Ct. at 1537. Yet the Court refused " 'to give the surface literal meaning to a jurisdictional provision.' " *Id.* at 1538. The Court instead looked to the underlying justifications for Section 1252—including whether there must be an expeditious means of affirming or removing a restraint on the government, and whether the decision below implicates the separation of powers. *Id.* at 1539. The Court concluded that even though (a) the District Court had held a federal statute unconstitutional, (b) the United States was contesting the retroactive application of the ruling " 'extending back to the beginning of Social Security if necessary' " (*id.* at 1535), and (c) the ruling thus resulted in "serious consequences" (*id.* at 1540), the appeal nevertheless was properly taken to the Court of Appeals rather than to this Court. In short, if the appealing party is seeking review of a holding of unconstitutionality, the appeal is to this Court; if he seeks review only of the remedy provided by the judgment, the appeal is to the Court of Appeals. *Id.* at 1541. *See also Equal Employment Opportunity Comm'n v. Allstate Insurance Co.*, 52 U.S.L.W. 3889 (U.S. June 12, 1984) (No. 83-1021) (appeal dismissed for want of jurisdiction even though remedy sought required reversal of constitutional holding not directly challenged).

Direct appeal to this Court in the circumstances of the instant case, like those in *Mitchell* v. *Donovan*, is also wholly unnecessary to save a state statute from "improvident doom." In such circumstances, in which the District Court has sustained the constitutionality of a state law over a federal constitutional challenge, the lower court's ruling, like the decree in *Wilentz* v. *Sovereign Camp*, 306 U.S. 573, 579 (1939), "amount[ed] to no more than a declaration that * * * provisions of the challenged statute" are valid. Plainly, there is no need for immediate intervention by this Court quickly to resolve the constitutional issues presented. If the situation here is

likened to that in *Heckler*, the portion of the judgment below being appealed did not impose a restraint on government or implicate federalism concerns, as an injunction would have done. Although the three-judge District Court below in effect denied an injunction, that issue is no longer in the case; this Court need not address it in any form. Therefore, the underlying assumptions of Section 1253 simply are not applicable.

Had appellants sought only declaratory relief in its complaint, this Court would not have jurisdiction over this appeal. *Mitchell* v. *Donovan*, *supra*. Hence, where the appellant seeks on appeal only to set aside the denial of declaratory relief, the fact that its complaint originally sought injunctive relief should be of no moment. *Cf. Mitchell* v. *Donovan*, 398 U.S. at 430 ("[w]hile there are similarities between injunctions and declaratory judgments, there are also important differences"). Therefore, there is no good reason to construe 28 U.S.C. § 1253 with absolute literalness in plain disregard of the underlying purpose for this provision. *See Gonzalez* v. *Automatic Employees Credit Union*, *supra*; *Heckler* v. *Edwards*, *supra*.

In view of the fact that appellant intends to pursue its appeal in the Court of Appeals, we respectfully suggest that this Court need not entertain this Jurisdictional Statement until and unless the Court of Appeals acts further. If that court—like the court in *Heckler*—dismisses the appeal because it believes jurisdiction lies exclusively in this Court, this Jurisdictional Statement will become ripe for review. On the other hand, if the Court of Appeals entertains the case on the merits and rules against appellant, this Jurisdictional Statement will become moot and will be dismissed, and appellant may then seek to have this Court review the case by way of certiorari.

2. *The Question of Congressional Intent to Waive Commerce Clause Restrictions.* As we show below, Arti-

cle X of the Yellowstone River Compact clearly violates the Commerce Clause unless it is immune from attack by virtue of congressional approval of the Compact. The District Court never addressed the constitutional violation because it held that Article X was totally immune from attack.

The Commerce Clause, Article I, Section 8, Clause 3, invests the Congress with plenary powers to regulate commerce among the states. Conversely, it restricts the ability of states to impose regulatory burdens on interstate commerce in the absence of either (a) direct congressional authorization for state regulation in an area of commerce, or (b) a legitimate state interest in regulation which outweighs the burdens imposed on interstate commerce and does not conflict with a congressionally mandated regulatory scheme. This case tests ambiguities which have arisen because Congress approved an interstate compact but did not, in any way, consider the potential impact on interstate commerce which ultimately resulted from state implementation of that compact.

The lower court concluded, without consideration of guidance from this Court to the contrary, that

> The Yellowstone River Compact, as a compact between states, was approved by the United States Congress; because the Compact was approved by Congress, the Compact is federal, not state law for consideration of Commerce Clause objections; therefore, the Compact cannot, by definition, be a state law impermissibly interfering with interstate commerce, but must be a federal law immune to Commerce Clause objections. * * * When Congress approved the Compact, Congress was acting within its authority to immunize state law from Commerce Clause objections by converting it to federal law. [App. 8a-9a.]

This Court must determine whether the three-judge District Court misconstrued recent precedents to conclude

that congressional approval of an interstate compact (1) necessarily incorporates the Compact into federal law for purposes *other than* federal question jurisdiction, and (2) automatically confers on the signatory States federal powers over interstate commerce. We submit that, absent specific evidence of intent, congressional approval of an interstate compact does not achieve either result.

As recently as this Spring, this Court unequivocally declared that congressional intent to waive Commerce Clause restrictions on interstate commerce must be "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 52 U.S.L.W. 4631, 4633 (U.S. May 22, 1984) (No. 82-1608). In *South-Central Timber*, the State of Alaska argued that congressional approval of a primary-manufacture requirement on Alaskan timber exported from *federal* lands constituted implicit authority for the State to impose a similar burden on timber exported from *state* lands. This Court rejected that argument, declaring that

> [t]he requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. [*Id.*]

South-Central Timber reinforced this Court's unwavering commitment to the principle that plenary power to regulate interstate commerce remains in the Congress unless Congress decides to delegate some portion of that power to the states. Thus, in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 958-960 (1982), this Court refused to accept 37 federal statutes and a number of interstate compacts as evidence of congressional intent to authorize state regulation of ground water. Similarly, in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982), the State of New Hampshire unsuccessfully argued that it was authorized by Congress to prohibit the export from the State of hydroelectric power by vir-

tue of a clause in the Federal Power Act, 16 U.S.C. §§ 824-824K (1976 & Supp. III 1979), providing that the Act "shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." Even this congressional sanction was insufficient to confer on the state federal power over interstate commerce in hydroelectric energy. The provision "simply save[d] from preemption * * * such state authority as was otherwise 'lawful.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. at 341. *See also Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946) (courts may not sustain state legislation from Commerce Clause attack absent an express statement of congressional intent).

In spite of the foregoing, the lower court here concluded, in effect, that when Congress approves an interstate compact, it concomitantly, necessarily and automatically delegates any related federal powers over interstate commerce to the signatory States. This result conflicts with the unambiguous guidance provided by the above precedents and finds no support in the authorities cited by the lower court.

Confusion arises from *Cuyler* v. *Adams*, 449 U.S. 433 (1981), as interpreted in *Texas* v. *New Mexico*, 103 S. Ct. 2558 (1983). In *Cuyler* v. *Adams*, this Court was asked to determine only whether a federal Court of Appeals was bound by a Pennsylvania state court determination that state prisoners have no constitutional right to a pre-transfer hearing conferred by the Interstate Agreement on Detainers. The Court of Appeals ruled that it was not bound to follow the state court. This Court agreed, noting that the interstate agreement in question had been "approved by Congress and is thus a *federal law subject to federal rather than state construction.*" *Cuyler* v. *Adams*, 449 U.S. at 438 (emphasis added). Thus, *Cuyler* v. *Adams* affirmed the principle

that an interstate compact is federal law for the purposes of establishing federal court jurisdiction.[9]

In short, *Cuyler* v. *Adams* and its predecessors settled *only* the question whether state courts are an appropriate forum for interpreting interstate compacts. *Cuyler* v. *Adams* did not settle the scope of congressional consent to a compact; nor did it establish that an interstate compact is transformed by congressional approval into a substantive federal law for purposes of constitutional scrutiny of state action under the compact.[10] To the contrary, this Court has ruled that congressional consent to an

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[9] *See also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) (this Court has jurisdiction to determine the meaning and validity of interstate compacts); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-279 (1959) (construction of a compact sanctioned by Congress presents a federal question); *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 427 (1940) (construction of an interstate compact sanctioned by Congress under the Compact Clause establishes a federal right which may be reviewed on certiorari by this Court).

[10] Nevertheless, *Cuyler* v. *Adams* suggests that the scope of congressional consent to a compact depends on congressional intent. Thus, the Court was careful to note that congressional intent to grant consent to the Interstate Agreement on Detainers under the Compact Clause, and to waive restrictions imposed under the Commerce and Extradition Clauses, was explicit in the legislative history. "The House and Senate Reports accompanying the legislation in question state that

> 'Legislation is necessary to accomplish the purpose sought by the bill because of the language of that part of article I, section 10, of the Constitution which provides: 'No State shall, without the consent of Congress . . . enter into an agreement or compact with another state. . . .'
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> * * * *
>
> 'This bill seeks to remove the obstruction imposed by the Federal Constitution and allow the States cooperatively and by mutual agreement to work out their problems of law enforcement.'" [449 U.S. at 441 n.9, quoting S. Rep. No. 1007, 73d Cong., 2d Sess., 1 (1934); H.R. Rep. No. 1137, 73d Cong., 2d Sess., 1-2 (1934).]

interstate compact often may be a mere formality which does not even grant congressional consent under the Compact Clause.[11] *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 470-471 (1978). Moreover, congressional approval of a state law does not automatically transform it into federal law even if federal approval is a prerequisite to making the state law effective. *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 399 n.13 (1979) (action taken pursuant to interstate compact is "under color of state law"); *Heffez* v. *Washington Metropolitan Area Transit Authority*, 569 F. Supp. 1551, 1553 n.3 (D.D.C. 1983) ("[C]ongressional consent and approval, standing alone, does not render the WMATA Compact part of federal law"). *See also Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977) ("It would be unreasonable to allow states to avoid the constraints imposed by the Fourteenth Amendment simply by joining forces with each other").

In the instant case, no evidence of congressional intent to waive interstate commerce considerations was even considered by the three-judge District Court—nor could it have found any. Instead, the District Court broadly interpreted *Texas* v. *New Mexico* and *Cuyler* v. *Adams* to conclude that the mere fact of congressional approval incorporates the Compact into federal law for all purposes and thereby settles the matter. The District Court began and ended by noting the existence of an Act of Congress approving the Compact. The court simply ignored the mandate in *Texas* v. *New Mexico* for federal courts to evaluate the constitutionality of interstate compacts. 103 S. Ct. at 2565.

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[11] As this Court noted in *United States Steel Corp.* v. *Multistate Tax Comm'n*, "It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling." 434 U.S. at 471.

If the decision below is left undisturbed, anomalies will arise in Commerce Clause and Compact Clause doctrine. State actions which are taken under authority of an interstate compact and which impose otherwise impermissible burdens on interstate commerce could avoid the general requirement that Congress must specifically waive dormant Commerce Clause restrictions. Similarly, whenever Congress approves an interstate compact, such approval may be deemed to be an extensive grant of related federal commerce powers, regardless of the extent, if any, of congressional consideration of effects on interstate commerce.[12]

Moreover, if the decision below stands, federal courts will be in disarray on two questions: (1) whether an interstate compact is federal law for purposes of constitutional analysis, and (2) whether federal powers have been delegated to states by virtue of congressional consent. *See, e.g., Washington Metropolitan Area Transit Authority* v. *One Parcel of Land in Montgomery County, Maryland*, 706 F.2d 1312, 1319, *cert. denied*, 104 S. Ct. 238 (1983) ("[No] prior case goes so far as to hold that consent may constitute delegation of federal power to the authority created by the compact"); *Bush* v. *Muncy*, 659 F.2d 402, 407 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982) (congressional consent to the Interstate Agreement on Detainers made it a law of the United States whose violation is grounds for habeas corpus relief).

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[12] The District Court also assumed, without analysis, that congressional approval of the Compact necessarily operated as congressional consent under the Compact Clause. When Congress acts under the Compact Clause, it approves an agreement among states which otherwise would have been unconstitutional because it potentially impinged on areas of federal supremacy. But, as this Court pointed out in *United States Steel Corp.* v. *Multistate Tax Comm'n*, many interstate compacts are approved by Congress which do not implicate Compact Clause restrictions on states. 434 U.S. at 471.

The lower court disregarded the requirements in *Cuyler* v. *Adams* that congressional intent must be considered in determining whether a compact is sanctioned under the Compact Clause and thus presents a question of federal law. 449 U.S. at 442-443. Moreover, it did not consider whether a congressionally approved compact might be considered state law for purposes of Commerce Clause analysis. *Cf. Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. at 399 n.13. And it ignored the mandate in *Texas* v. *New Mexico* that federal courts are not bound by the provisions of an interstate compact if that compact is "somehow unconstitutional." 103 S. Ct. at 2565.

In sum, this Court must decide whether an interstate compact such as the Yellowstone River Compact has been transformed by the approval process into a law of the United States for all purposes. More specifically, this Court must determine whether perfunctory approval of an interstate compact in which Congress does not consider interstate commerce ramifications and does not expressly exempt state actions taken under it from Commerce Clause objections must be assumed to be immune from such objections. If so, the District Court's decision has established an important exception to the principle established in *Prudential Ins. Co.* and emphasized by this Court in *South-Central Timber* and *New England Power*.

3. *The Burden on Interstate Commerce.* Article X of the Compact establishes a self-enforcing ban on export of water from the Yellowstone River Basin. Only the signatory States—Montana, North Dakota, and Wyoming—are empowered to lift the ban by granting unanimous consent to a diversion. In Montana, the state legislature must consent to the first out-of-basin diversion. In North Dakota, the State Water Commission is authorized to grant consent but has not done so. In Wyoming, the State Engineer may consent to an out-of-basin diversion, but only the legislature may consent to an interstate

use of such a diversion. None of the signatory States has advanced, or even suggested, a legitimate state interest which would be served by withholding consent to an interstate diversion. The question presented, therefore, is whether the signatory States, by virtue of their continuing omission to act either affirmatively or negatively on the question of out-of-basin diversions, are maintaining an impermissible burden on interstate commerce in water.[13]

This Court has firmly implanted the principle that water is an article of interstate commerce. As such, state restrictions on interstate commerce in water must serve a legitimate state purpose which cannot be "promoted as well with a lesser impact on interstate activities." *Sporhase*, 458 U.S. at 954, quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Strong precedent dictates that, absent specific congressional approval, a state may not impose burdens on interstate commerce in water unless the restrictions are precisely tailored to serve the state's actual, legitimate interests in its water resources. *Sporhase*, 458 U.S. at 957. In the instant case, the signatory States are preserving through inaction an absolute moratorium on the export of water from the Yellowstone River Basin. *Cf. Texas* v. *New Mexico*, 103 S. Ct. at 2568 n.17 (it is "too mon-

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[13] Even if this Court determines that congressional approval of the Compact operated to delegate to the signatory States congressional power to regulate interstate commerce insofar as the waters of the Yellowstone River are affected, the question remains whether Congress consented to a perpetual ban on out-of-basin diversions. If it did not, have the signatory States exceeded the authority granted them in the Compact to enforce a water allocation scheme for Yellowstone River water? Similarly, does it not follow from the Compact (which is, after all, a water allocation scheme designed to avoid conflicts among the signatory States) that Congress assumed that consent to out-of-basin diversions would normally be granted for the beneficial use of Yellowstone River waters unless a proposed diversion would endanger more serious local water needs?

strous to be entertained" that one state could defeat the rights of another's citizens simply by failure to act). This moratorium remains in place, without justification, in spite of indications that there is a surplus of water in the Yellowstone River Basin. *See Montana Department of Natural Resources and Conservation* v. *Intake Water Co.*, 171 Mont. 416, 558 P.2d 1110, 1121 (1976); Wyoming Framework Water Plan, prepared by Wyoming State Engineer, May 1973. And the moratorium is imposed without regard to the serious consequences it will have for utilization of nationally important coal reserves in the region. *See* Transcript of Proceedings, April 19, 1984, CV-1184, pp. 37-40, 47-49.

The simple fact is that any of the three signatory States is able to use Article X to block the transfer of water from the Yellowstone River Basin to other states which have an immediate need for it. Ironically, citizens of North Dakota present a concrete example of how Article X impedes interstate commerce in water. The City of Beach, North Dakota, has a pressing need for water. If Article X were not in force, water from the Yellowstone River would be brought to Beach to meet its municipal and industrial water requirements. Similarly, if Article X constraints were removed, an Intake affiliate would be in a position to build a synthetic fuel plant outside the basin and closer to the coal reserves (possibly in North Dakota), and that plant would utilize water from the Yellowstone River to synthesize gas from coal. The gas produced in that plant could serve industrial and residential consumers in other surrounding states. But, so long as Article X remains a barrier, water from the Yellowstone River will not be utilized to its full potential in spite of its possible uses in interstate commerce.

The absolute ban imposed by the refusal of the signatory States to grant Article X consent constitutes an even more serious burden on interstate commerce in water than the reciprocity requirement condemned in *Sporhase*.

Indeed, it most clearly resembles the ban on the export of hydroelectric power from the State of New Hampshire which this Court struck down in *New England Power Co.* v. *New Hampshire, supra.* Moreover, in the instant case, Commerce Clause restrictions should be applied rigorously because the signatory States have imposed an absolute restriction on the sale of a natural resource that is vital to interstate commerce. *See South-Central Timber Development, Inc.* v. *Wunnicke,* 52 U.S.L.W. at 4634 (Commerce Clause restrictions are particularly applicable where a state imposes a restriction on the sale of a natural resource to out-of-state purchasers). And, finally, the theoretical possibility that the state legislatures might eventually grant consent to a diversion does not save Article X from being declared an unconstitutional impediment to interstate commerce. *See City of Altus* v. *Carr,* 255 F. Supp. 828, 833-834 (W.D. Tex.), *aff'd,* 385 U.S. 35 (1966).

Nowhere has this Court—or the Congress—indicated that the Commerce Clause may be avoided by states merely by winning congressional approval of an interstate compact. Nor is there authority for the proposition assumed by the District Court that, where Congress approves an interstate compact which, in its eventual implementation, imposes unreasonable burdens on interstate commerce not foreseen or addressed at the time of approval, Congress has prospectively approved every such burden. The Compact at issue was designed to allow signatory States to resolve differences over water rights in the Yellowstone River that might arise in times of scarcity and in the context of agricultural uses. *See* Preamble to the Compact, Pub. L. No. 231, 65 Stat. 663. By virtue of Article X, the Compact now burdens interstate commerce in a manner that could not have been foreseen by Congress—even if it had addressed the matter—and that clearly violates the Commerce Clause. It precludes the sale of water for industrial use outside the Yellowstone River Basin. Although the District Court's

opinion suggests the contrary, congressional consent to the Compact does not "constitute persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase*, 458 U.S. at 960. Instead, the burden of proof lies on the signatory States to demonstrate why the Article X ban is not an impermissible burden on interstate commerce under the rule announced in *Sporhase*. Unless the signatory States can demonstrate to the satisfaction of the trial court a legitimate state interest which can only be served by maintaining a moratorium of unspecified duration on out-of-basin diversions, the Article X ban is unconstitutional. *See Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951).

A declaration that the Article X ban unconstitutionally obstructs interstate commerce would assure that an interstate compact, such as the one at issue, may not be used as a circuitous route to avoid the limitations imposed on states by the Commerce Clause. *Sporhase*, 458 U.S. at 959-960 ("interstate compacts demonstrate Congress' deference to state water law, [but] they do not indicate that Congress wished to remove federal constitutional constraints on such state laws"). Moreover, such a declaration would be consistent with the principle that congressional authorization for states to impose burdens on interstate commerce must be "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 52 U.S.L.W. at 4633.

CONCLUSION

We respectfully request this Court to hold this Jurisdictional Statement and not act thereon until the Court of Appeals has had an opportunity to review the case on the merits. However, should this Court reach the merits, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

Docket Number CV 1184

JUDGE JAMES F. BATTIN

INTAKE WATER COMPANY,
Plaintiff,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendants' motion to dismiss plaintiff's seconded [sic] amended complaint is granted.

Judgment is entered for the defendants and against the plaintiff.

[Filed Oct. 25, 1983]

Date 10-25-83

LOU ALEKSICH, JR.
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1184

INTAKE WATER COMPANY,
Plaintiff,

—vs—

YELLOWSTONE RIVER COMPACT COMMISSION, GARY FRITZ; GEORGE L. CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Compact Commission; MIKE GREELY, Attorney General of The State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants.

ORDER

[Filed Oct. 25, 1983]

Pursuant to the Court's Memorandum Opinion this day filed in the above-captioned case, the Court issues the following order:

IT IS ORDERED that defendants' motion to dismiss plaintiff's seconded [sic] amended complaint is granted.

The Clerk of Court is directed to enter judgment for the defendants and against the plaintiff.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 11th day of October, 1983.

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
United States Circuit Judge

/s/ James F. Battin
JAMES F. BATTIN
United States District Judge

/s/ Paul G. Hatfield
PAUL G. HATFIELD
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1184

INTAKE WATER COMPANY,
Plaintiff,

—vs—

YELLOWSTONE RIVER COMPACT COMMISSION, GARY FRITZ; GEORGE L. CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Compact Commission; MIKE GREELY, Attorney General of The State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants.

MEMORANDUM OPINION

[Filed Oct. 25, 1983]

This suit for declaratory and injunctive relief is before the Court on a motion to dismiss the four-count second amended complaint. Jurisdiction is conferred by 28 U.S.C. § 1331 and complete diversity under 28 U.S.C. § 1332. When this case was filed on June 23, 1973, a three-judge panel was required by statute for cases such as this one seeking to declare state statutes unconstitutional. 28 U.S.C. § 2281 repealed by Act of August 12, 1976, 90 Stat. 1119. For the reasons discussed below, defendants' motion to dismiss is granted with respect to all Counts.

FACTS

Intake Water Company, a wholly-owned subsidiary of Tenneco, Incorporated, is engaged in purchasing and developing water resources throughout the northwestern United States. Defendant Yellowstone River Compact Commission is charged with implementing a three-state water distribution agreement known as the Yellowstone River Compact. The signatory states are Montana, Wyoming and North Dakota. The Yellowstone River Compact fixes the water usage of all the waters of the Yellowstone River Basin.[1] The Yellowstone River Compact was approved by the legislatures of the three states in early 1951 and by Congress by an Act of October 10, 1951, Public Law 231, 65 Stat. 663. The individual defendants are members of the Yellowstone River Compact Commission (the Commission), the Montana Attorney General and the State Engineer of North Dakota.

In June 1973, Intake Water Company (Intake) appropriated 80,650 acre feet per year (50,000 gallons per minute) of Yellowstone River water pursuant to Montana law. Intake planned to construct a water diversion and reservoir near Dawson, Montana, at a cost of approximately $20 million. Some of the water was to be diverted outside the Yellowstone River Basin for use in Montana and North Dakota and thus outside the jurisdiction of the Yellowstone River Compact. Intake filed this suit in late June 1973 for a determination of the constitutionality of a specific provision of the Yellowstone River Compact (the Compact) and a Montana statute requiring the permission of the Montana Legislature to export Montana water for use out of state.

In 1974, the instant case was stayed pending litigation in state court of a preliminary issue. In late 1976,

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[1] The Yellowstone River Basin is the drainage of the Yellowstone River and its tributaries, located mainly in Montana but also including parts of Wyoming and North Dakota.

the Montana Supreme Court affirmed the state district court decision in favor of Intake. No motion was made to dissolve the stay in the instant case until 1980. In that year, this Court issued an order to show cause why the case should not be dismissed for want of prosecution. Intake provided the Court with an affidavit listing the activities of Intake during the period from 1977 to 1980; the Court was satisfied that Intake had pursued the interests intended to be protected by this lawsuit during the period from 1977 to 1980 and allowed the case to continue.[2] Intake filed its second amended complaint in December 1981. Defendants moved to dismiss, and briefing continued during 1982. Oral argument on the motion to dismiss was heard April 19, 1983, before Judges Goodwin, Battin and Hatfield.

PLAINTIFF'S CONTENTIONS

Intake seeks a declaration from this Court of the legality of the restrictions placed on interbasin and interstate transfers of Yellowstone River water. Article X of the Compact restricts interbasin uses of Yellowstone River water by requiring all signatory states to consent to interbasin diversion:

> No waters shall be diverted from the Yellowstone River Basin without unanimous consent of all the signatory states [Montana, Wyoming, North Dakota] . . . .

Another obstacle to the interstate diversion of Yellowstone River water was, at the time suit was filed, Montana Code Annotated (hereinafter MCA) § 85-1-121

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[2] After resolution of the state suit in late 1976, Intake applied to the Commission for permission to divert the sought-after waters with the expectation that if the request were granted the instant suit would be moot. The Commission determined that the state legislatures were the proper forum for Intake's request. Attempts to pass favorable legislation during Montana's 1979 session were futile.

(1979); however, the Montana legislature repealed this statute in its entirety during the 1983 session, effective April 29, 1983. 1983 Laws of Montana, Cptr 706, House Bill No. 908. Consequently, consideration of the claims premised on this statute—Count 1 of Intake's second amended complaint—need not be addressed by the Court.

Count II attacks the constitutionality of Article X of the Yellowstone River Compact (quoted above in pertinent part) based on that article's alleged impermissible burden on interstate commerce in that it requires unanimous consent of three states before interbasin water transfer is allowed. Intake seeks both a declaratory judgment that Article X of the Compact is unconstitutional and a permanent injunction preventing enforcement. We find that because the Compact was ratified by Congress, Article X must be interpreted as federal law, immune from Commerce Clause attacks. Thus, Count II fails to state a claim for relief.

Count III attacks the constitutionality of Article X of the Compact based on a denial of the Fourteenth Amendment right to equal protection. The equal protection claim arises because the right to divert Yellowstone River water out of the Basin is conditional pending consent of Montana, Wyoming and North Dakota, although interbasin diversion from other Montana rivers is not subject to the same constraint. Briefly stated, the guarantees of equal protection apply to people, not geographical areas, and, hence, Count III must be dismissed.

Count IV seeks a declaration of this Court that the Compact does not apply to Intake's planned diversion. Intake claims that the Yellowstone River at Dawson, Montana, is not part of the waterway regulated by the Compact. Intake seeks an injunction permanently restraining enforcement of the Compact's prohibitions against the proposed interbasin water transfer from the diversion site at Dawson. Because the interpretation of the Compact necessary for Intake's contention to state a

claim is totally without foundation, Count IV must be dismissed.

A motion to dismiss pursuant to F.R.Civ.P. 12(b)(6) is viewed with disfavor because the primary objective of the legal system is to obtain a determination on the merits, not a dismissal based on pleadings rather than proof. *Rennie & Laughlin, Inc. v. Chrysler Corporation*, 242 F.2d 308 (9th Cir. 1957). For this reason, a complaint is liberally construed in the light most favorable to the plaintiff. The Court must take as true the factual allegations of the complaint. *Experimental Engineering v. United Technologies*, 614 F.2d 1244 (9th Cir. 1980); 2A Moore's Federal Practice, ¶ 12.08. A complaint will not be dismissed for failure to state a claim unless it is abundantly clear that the plaintiff is not entitled to any relief under any set of facts which could be proved in support of the claim. *Conley v. Gibson*, 355 U.S. 41 (1957); *Jablon v. Dean Witter & Company*, 614 F.2d 677 (9th Cir. 1980).

DISCUSSION

COUNT II: Commerce Clause

Intake alleges in its Count II that Article X of the Compact, as state law, places a constitutionally impermissible burden on interstate commerce[3] because the Article requires unanimous consent from Montana, Wyoming and North Dakota before Yellowstone River water may be transferred outside the Yellowstone River Basin. Defendants do not directly contest the sufficiency of this count. Instead, defendants rely on the following argument: The Yellowstone River Compact, as a compact between states, was approved by the United States Congress; because the Compact was approved by Congress, the Compact is federal, not state law for consideration of Commerce Clause objections; therefore, the Compact

[3] Constitution, Art. I, § 8, cl. 3.

cannot, by definition, be a state law impermissibly interfering with interstate commerce, but must be a federal law immune to Commerce Clause objections. We find this argument compelling. When Congress approved the Compact, Congress was acting within its authority to immunize state law from Commerce Clause objections by converting it to federal law. Therefore, Count II fails to state a claim for relief.

Strong authority supports the proposition that the Compact is federal law. *See Texas v. New Mexico*, 103 S.Ct. 2558 (1983); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974). Federal legislation is not subject to the restrictions that the Commerce Clause imposes on state laws affecting commerce. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946). Under the Commerce Clause, Congress may, unlike the states, enact legislation that affects states unequally. *Hodel v. Indiana*, 452 U.S. 314, 332 (1981) (Congress may impose legislation that respects geographic differences). Thus, to the extent the Compact is federal law, this Court cannot invalidate it on the basis of its effects on interstate commerce.

Just as Congress may itself enact a law that interferes with interstate commerce, it may also give its approval to a state law interfering with interstate commerce and thereby immunize the law from challenge under the Commerce Clause. *See, e.g., Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). In many cases, the issue is whether Congress in fact approved the state law for which immunity from Commerce Clause attack is claimed. That is not an issue in the present case; the Compact was before Congress and Congress voted to approve it.

Because Congress voted directly on the Compact, the cases that require an express statement of Congressional intent to immunize state legislation from Commerce Clause challenge, *e.g., New England Power Co. v. New*

Hampshire, 455 U.S. 331, 343 (1982); *Sporhase v. Nebraska, ex rel. Douglas*, 103 S.Ct. 3456; 3466 (1982), are inapposite. In those cases, Congress had enacted laws that dealt in general terms with a given subject, and it was argued that this general treatment of the subject revealed Congress's intent to immunize from Commerce Clause attack the state laws at issue in those cases. In *New England Power*, New Hampshire argued that a general saving clause in the Federal Water Power Act immunized the New Hampshire statute at issue from a Commerce Clause attack. In *Sporhase*, Nebraska argued that Congress's deference to state water law in various unrelated federal statutes and its approval of interstate compacts dealing with water rights showed that Congress intended to defer to other state statutes dealing with water rights, including the Nebraska statute at issue in *Sporhase*. In both cases, the state law at issue had not been placed directly before Congress for its approval. The Court held that Congress had not stated explicitly enough an intent to immunize the state statutes from Commerce Clause attacks and voided both statutes as impermissible burdens on interstate commerce. Here, Congress's approval of the Yellowstone River Compact in 1951 may be considered the express statement of intent to immunize the Compact from attack that the Court found lacking in *Sporhase*.

Furthermore, the Constitution requires congressional consent to an interstate compact only when the compact threatens to encroach upon the supremacy of the United States. A threat to the supremacy of the United States necessarily entails a threat to one of Congress's enumerated legislative powers since those powers are the source of supreme federal authority. Thus, when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area. *See Cuyler v. Adams*, 449 U.S. 433

(1981). In the present case, therefore, to the extent that the Compact interferes with interstate commerce, Congress has exercised its commerce power in approving the Compact. For the reasons discussed above, defendants' arguments that the Yellowstone River Compact is immune to Commerce Clause attack persuade this Court that defendants' motion to dismiss Count II should be granted.

COUNT III: Equal Protection

Intake alleges in its Count III that it is a violation of equal protection under the Fourteenth Amendment for the Compact to restrict interbasin transfer of Yellowstone River water, while other water appropriations from other river basins in Montana do not require consent of all the signatory states to the Compact. Second Amended Complaint, Count III, ¶ XII. For the reasons discussed below, Count III must be dismissed for failure to state a claim.

It is well settled that the Fourteenth Amendment does not prohibit legislation that operates on a limited geographical area within a state:

> [W]e have held that the equal protection clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. *McGowan v. Maryland*, 366 U.S. 420, 426-27 (1960).

Legislation such as the Yellowstone River Compact, that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. *Hodel v. Indiana*, 101 S.Ct. 2376, 2386 (1981); moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. *Id.*

That the signatory states have an interest in the equitable use and management of Yellowstone River water cannot be doubted. The means employed by the affected states to achieve this legitimate governmental purpose—an interstate compact—are quite logically limited to the states containing the Yellowstone River Basin. That the Compact is limited to the Yellowstone River Basin, and other river basins are not so manged, is not a constitutional defect. Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. *See McGowan v. Maryland*, 366 U.S. 420 (1961). Considering the facts as alleged by Intake to be true, Intake cannot, as a matter of law, meet the heavy burden to show that the Yellowstone River compact is not rationally related to a legitimate governmental purpose. Since every water appropriation from the Yellowstone River Basin is subject to the Compact, there is no violation of the guarantees of equal protection. Therefore, Count III must be dismissed.

COUNT IV: *Compact Article V*

Intake alleges in its Count IV that the proposed diversion of Yellowstone River water at Dawson, Montana, is outside any regulatory provision of the Compact. Intake's claim is based on Article V of the Compact, which apportions among Wyoming and Montana unused and unappropriated waters of Wyoming-originating tributaries. These waters are defined by river flow between certain points; however, the Yellowstone River at the proposed diversion site is not specifically apportioned by Article V. Intake concludes that, because the water at the proposed diversion point is not specifically apportioned, Intake can divert Yellowstone River water without permission of the Commission. For the reasons discussed below, Intake's Count IV fails to state a claim and must be dismissed.

Article I of the Compact states:

> Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of said state shall be subject to the terms of this Compact. . . . Article I(b).

By the plain language of the above Article, Intake, a corporation seeking to use waters of the Yellowstone River under authority of the State of Montana, is subject to the terms of the Compact. *See generally Montana Department of Natural Resources and Conservation v. Intake Water Company*, 171 Mont. 416, 558 P.2d 1110 (1976) (Intake has a valid water appropriation for its planned diversion at Dawson, Montana).

Furthermore, contrary to the assertions of Intake, the Yellowstone River at Dawson is within the purview of the Compact. The Compact defines its terms in Article II. The term "Yellowstone River Basin" means the area in Wyoming, Montana and North Dakota drained by the Yellowstone River and its tributaries. Article II(c). The "Yellowstone River system" is defined as the Yellowstone River and all its tributaries, including springs and swamps, from their sources to where the Yellowstone River empties into the Missouri. Article II(d). "Water diversion" means taking or removing water from the Yellowstone River or any tributary when the water is not returned directly into the flowing water from which it is taken. Article II(g). The uncontroverted facts show that the planned diversion at Dawson is within the Yellowstone River Basin, and is on the Yellowstone River system, and is therefore within the purview of the Compact.

Intake misreads Article V of the Compact when it cites Article V as an exhaustive apportionment of Yellowstone River water. Article V only purports to allocate between Montana and Wyoming unused and unappropriated water of four tributaries of the Yellowstone that originate in Wyoming. The Compact refers to all the waters of the Yellowstone River Basin, not just the apportionment of the four principal Wyoming-originating tributaries.

Applying well-known rules of statutory construction and common sense, the plain meaning of Article V gives no support whatsoever to Intake's claim that its proposed diversion is outside the purview of the Compact. Taking all factual statements alleged by Intake as true, Count IV fails to state a claim.

Because the Court has disposed of each count of plaintiff's second amended complaint based on a separate consideration of the legal merit of each count, it is unnecessary for the Court to consider the general arguments raised by defendants, such as failure to join an indispensable party and exhaustion.

CONCLUSION

After careful evaluation by this Court, we find that Intake Water Company's second amended complaint fails to state a claim for relief and must be dismissed.

An appropriate order in conformance with this Opinion will issue.

Done and dated this 11th day of October, 1983.

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
United States Circuit Judge

/s/ James F. Battin
JAMES F. BATTIN
United States District Judge

/s/ Paul G. Hatfield
PAUL G. HATFIELD
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1184

INTAKE WATER COMPANY,
Plaintiff,

—vs—

YELLOWSTONE RIVER COMPACT COMMISSION, GARY FRITZ; GEORGE L. CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Compact Commission; MIKE GREELY, Attorney General of The State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants.

ORDER

[Filed Apr. 30, 1984]

The Court has examined the briefs submitted by the parties on plaintiff's motion to reconsider the Court's prior opinion and order in the above-captioned case. We find that the arguments raised by plaintiff appear to be simply a restatement of its position as documented in the voluminous briefs filed for this Court's consideration on defendants' motion to dismiss. This restatement of plaintiff's arguments does not persuade the Court that its original decision was in error. Therefore,

IT IS ORDERED that plaintiff's motion to reconsider and for oral argument is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 30th day of April, 1984.

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
United States Circuit Judge

/s/ James F. Battin
JAMES F. BATTIN
United States District Judge

/s/ Paul G. Hatfield
PAUL G. HATFIELD
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

Civil Docket No. 1184

INTAKE WATER COMPANY,
a Delaware corporation,
Plaintiff-Appellant,

—vs—

YELLOWSTONE RIVER COMPACT COMMISSION; GARY FRITZ; GEORGE CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Company Commission; MIKE GREELY, Attorney General of the State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants-Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Intake Water Company, the plaintiff above named, being in receipt of the Order of the District Court dated the 30th day of April, 1984, denying Plaintiff's Motion to Alter, Amend and/or Vacate Judgment filed herein pursuant to Rule 59(e), F.R.Civ.P., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 25th day of October, 1983, dismissing plaintiff's Second Amended Complaint for Declaratory Judgment and Application for Injunctive Relief from Three-Judge Court, pursuant to Order of the District Court based on a Memorandum Opinion

of the District Court, both dated the 11th day of October, 1983.

This is a partial appeal from that portion of the Judgment denying plaintiff's request for declaratory relief. No appeal is taken from that portion of the Judgment denying plaintiff's request for injunctive relief. Accordingly, plaintiff, as appellant, believes that jurisdiction lies in the Court of Appeals as a matter of right. 28 U.S.C. 1291 and Rules 3 and 4, F.R.App.P. *Cf. Heckler* v. *Edwards*, 52 U.S.L.W. 4373 (S.Ct. March 21, 1984). As a protective measure, however, plaintiff intends to file a timely jurisdictional statement in the United States Supreme Court with the request that it defer consideration of this case pending the disposition of this case in the Court of Appeals. The matter of appellate jurisdiction will be fully addressed in plaintiff's brief on the merits as appellant in the Court of Appeals.

DATED this 25th day of May, 1984.

LOBLE & PAULY, P.C.

By /s/ Peter C. Pauly
PETER C. PAULY
Attorneys for
Plaintiff-Appellant,
Intake Water Company,
a Delaware corporation

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